IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 1268

FRANK A. DUDLEY, CHARLES DOHERTY and RONALD G. WRIGHT, constituting the Stockholders Protective Committee,

Petitioners,

against

CARROLL E. MEALEY, as Trustee of Albany Hotel Corporation, Debtor; THE NATIONAL COMMERCIAL BANK AND TRUST COMPANY of Albany, as Indenture Trustee for Debtor's First and Refunding Bonds of 1939, and its First and Refunding Bonds of 1946; BONDHOLDERS PROTECTIVE COMMITTEE for the holders of Debtor's First and Refunding Bonds of 1946; FIRST TRUST COMPANY of Albany, as Indenture Trustee for Debtor's General Mortgage Bonds and its 7% Gold Bonds; GENERAL MORTGAGE BONDHOLDERS PROTECTIVE COMMITTEE; and FIRST TRUST COMPANY of Albany,

Respondents.

In Proceedings for the Reorganization of Albany Hotel Corporation, No. 32,561

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OPPOSING WRIT OF CERTIORARI

This brief is respectfully submitted on behalf of all Respondents.

Statement

Albany Hotel Corporation, the Debtor, is the owner and operator of the Ten Eyck Hotel in the City of Albany, New York. On March 17, 1943, The National Commercial Bank and Trust Company of Albany, as Indenture Trustee

under the mortgage given to secure the Debtor's first and refunding mortgage bonds, instituted suit in the Supreme Court of the State of New York, County of Albany, to foreclose said mortgage, and had a Receiver appointed. On March 20, 1943, the Debtor filed its petition under Chapter X of the Bankruptcy Act, seeking leave to effect a reorganization. On the same day the District Court for the Northern District of New York made its order approving said petition as properly filed, and appointed the Respondent, Carroll E. Mealey, Reorganization Trustee. His appointment was subsequently made permanent.

On or about January 12, 1944, the Reorganization Trustee submitted a proposed reorganization plan. Thereafter the petitioners filed a proposed plan. The record filed by petitioners with this Court deals almost exclusively with the testimony taken before the District Court in connection with said original plans. The hearings convinced the Trustee that neither plan was feasible and could not properly be approved by the District Court. Accordingly the Trustee, on or about April 29, 1944, submitted an amended plan. Said amended plan made no provisions for stockholders.

After further hearings the District Court made its order, dated June 13, 1944, finding the Debtor insolvent (R. 39), finding the plan filed by the petitioners (the stockholders) neither fair, equitable nor feasible (R. 39), and approving the amended plan filed by the Trustee (R. 39). The petitioners appealed to the Circuit Court of Appeals from said order (R. 44).

On January 5, 1945, the Circuit Court handed down its decision, accompanied by an opinion by Judge Learned Hand evidencing a most painstaking study not only of the briefs of counsel but of the printed record and the several exhibits handed up to the Court upon the argument but not contained in the printed record, wherein after reviewing the

facts and figures at length (R. 424), he says: "*the debtor was plainly insolvent.*" (R. 426.) (Italics ours.) It remanded the cause to the District Court for further proceedings not inconsistent with its opinion (R. 432).

Petitioners in their petition state (page 3) that: "Debtor never operated the hotel property." This same statement is reiterated at page 10. The fact is that at all times since built the hotel has been owned by Debtor. It was operated by The Ten Eyck Co., Inc., as lessee until the bankruptcy of said lessee in 1942, at which time the Debtor took over the operation and so continued until the reorganization proceeding (R. 254, 255, 256). During the entire operation, both by The Ten Eyck Co., Inc., and Debtor, United Hotels Company of America, Inc., managed the hotel under a series of management contracts. Each of said three corporations had a Board of five Directors. The petitioners, Frank A. Dudley, Charles Doherty and Ronald G. Wright constituted a majority of each of said three Boards. In fact, therefore, there has been no actual change in control from the date the hotel was opened for business in 1898, down to the present time.

POINT I.

The question of insolvency is one of fact not reviewable by this Court.

The District Court has found the Debtor insolvent. Its said finding has been unanimously approved by the Circuit Court.

Whether the Debtor was and is insolvent is a question of fact not open to review in this Court.

Kaufman v. Treadway, 195 U. S. 271, 273.

Citing:

Hedrick v. Atchison, Topeka & Santa Fe Ry. Co., 167 U. S. 673, 677.

Bement v. National Harrow Co., 186 U. S. 70, 83.

Jenkins v. Neff, 186 U. S. 230.

POINT II.

The decision of the Circuit Court is not in conflict with the decisions of this Court.

The rule enunciated by this Court in

Galveston H. & S. R. Co. v. Texas, 210 U. S. 217,

Consolidated Rock Products Co. v. Dubois, 312 U. S. 510,

Group of Institutional Investors v. Chicago, M., St. P. & P. R. Co., 318 U. S. 523,

is the very rule which the lower courts applied.

Reference to the opinion of the Circuit Court (R. 424), shows that it went into great detail in its statement respecting the assets and liabilities of the Debtor and gave only proper weight to the lack of earning power demon-

strated by the history of the hotel from 1931 to 1942, inclusive, all in conformity with the aforesaid decisions of this Court.

It is, however, proper to point out that the attempt of petitioners at pages 4 and 5 of their petition to exclude from the Debtor's liabilities $84,190.00 of real estate taxes is predicated upon a misstatement of fact. They say that said "real estate taxes became due Jan. 1, 1944 for the calendar year of 1944. Debtor's insolvency was being determined as of Dec. 31, 1943." These taxes, although payable January 1, 1944, became a lien on the real estate during the year 1943 and are based on the 1943 assessment, and therefore cannot be ignored in determining the Debtor's net worth as of December 31, 1943.

Nor can there be excluded from the Debtor's liabilities the $15,000.00 of first and refunding mortgage bonds which, although legal title thereto was in the Debtor, cannot be considered an asset of the Debtor since they were all pledged as collateral security (R. 11).

Nor can there be added to the value of the land and buildings, as petitioners attempt to do at page 6 of their petition, the $115,010.00 appraised value of the movable furniture, silverware, etc., since its value was already taken into consideration by Mr. Toth in arriving at the going value of the Debtor (R. 118).

POINT III.

The fact that the plan contemplates a sale to a new corporation is expressly within the contemplation and provisions of Chapter X.

A sale of the assets of a Debtor corporation to a new corporation is expressly sanctioned by Chapter X as it was by former Section 77B and has been repeatedly approved by the courts.

Section 216 provides:

> "A plan of reorganization under this chapter * * * (10) shall provide adequate means for the execution of the plan, which may include: * * * *the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized;* * * * the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets or the proceeds derived from the sale thereof, among those having an interest therein; * * * (italics ours).

Bankruptcy Act, Section 216; 11 U. S. C. A., Sec. 616.

Matter of Central Funding Corporation; Union Trust Company of Maryland v. Wagner (C. C. A. 2d) 75 F. (2d) 256.

In re Porto Rican Tobacco Co. (C. C. A. 2d) 112 F. (2d) 655.

In re Englander Spring Bed Co. (D. C. N. Y. 17 F. Supp. 15, aff'd. without opinion (C. C. A. 2d) 86 F. (2d) 998.

Continental Insurance Company v. Louisiana Oil Refining Co. (C. C. A. 5th) 89 F. (2d) 333.

POINT IV.

The judgment which petitioners desire to review is not a final judgment and should not be reviewed by this Court.

The judgment in question remanded the reorganization proceeding to the District Court for further proceedings not inconsistent with its opinion (R. 431, 432). This Court has repeatedly said that except in extraordinary cases a writ of certiorari is not issued until final decree, and that the circumstance that the decision of the Circuit Court of Appeals is not a final one is a fact which standing alone may furnish sufficient ground for the denial of the application.

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251.

Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399.

POINT V.

The petition for a writ of certiorari should be denied.

Dated, May 23, 1945.

Respectfully submitted,

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